

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Raw Bandwidth Communications, Inc.,

Complainant,

vs.

SBC California, Inc. (U-1001-C) and SBC
Advanced Solutions, Inc. (U-6346-C),

Defendants.

Case 03-05-023
(Filed May 15, 2003)

**ADMINISTRATIVE LAW JUDGE'S RULING REGARDING
NOTICE OF INTENT TO SEEK COMPENSATION**

As permitted by Pub. Util. Code § 1804(b)(2), I find in consultation with the Assigned Commissioner that Raw Bandwidth Communications, Inc. (Raw Bandwidth) is a customer. Raw Bandwidth must satisfy the significant financial hardship test before it can be found eligible for compensation in this proceeding.

Timeliness

Section 1804(a)(1) provides that a Notice of Intent (NOI) must be filed and served within 30 days after the prehearing conference (PHC), unless no PHC is held or the proceeding is expected to be completed in less than 30 days. A PHC was held on August 23, 2003. Raw Bandwidth timely filed its NOI on September 19, 2003.

Eligibility

To be eligible for compensation, a participant in a formal Commission proceeding, such as this one, must establish that it is a “customer” and that participation without compensation would pose a significant financial hardship.

Customer Status

Section 1802(b) defines the term “customer” as:

“[A]ny participant representing consumers, customers, or subscribers of any electrical, gas, telephone, telegraph, or water corporation that is subject to the jurisdiction of the commission; any representative who has been authorized by a customer; or any representative of a group or organization authorized pursuant to its articles of incorporation or bylaws to represent the interests of residential customers”

Thus, there are three categories of customers: (1) a participant representing consumers; (2) a representative authorized by a customer; and (3) a representative of a group or organization authorized in its articles of incorporation or bylaws to represent the interests of residential customers. The Commission requires a participant to specifically identify in its NOI how it meets the definition of customer and, if it is a group or organization, provide a copy of its articles or bylaws, noting where in the document the authorization to represent residential ratepayers can be found. (Decision (D.) 98-04-059, *mimeo.*, at pp. 30-32; *see, also*, fn. 13-16.)

Raw Bandwidth states it is a customer, because it is a participant representing consumers or customers and all of the issues in the complaint allege wrongdoings that affect all independent Internet Service Providers (ISP) that subscribe to the Digital Subscriber Line (DSL) Transport Service provided by SBC California, Inc. and SBC Advanced Solutions, Inc. Raw Bandwidth also states

that most of the issues in the complaint also affect residential customers who are end-users of DSL service from the independent ISPs.

Defendants oppose Raw Bandwidth's NOI, because Raw Bandwidth raises issues that are part of its ongoing business relationship with Defendants and its own business concerns, not the concerns of any consumers.

The Commission allows intervenor compensation in complaint proceedings. However, a complainant acting solely in an individual capacity and seeking a personal remedy is not entitled to seek compensation. (D.98-04-059, *mimeo.*, pp. 21-22; *Grinstead v. Pacific Gas and Electric Co.*, D.95-10-050, 62 CPUC 2d 202.) Raw Bandwidth raises issues that apply to other ISPs, such as discrimination in the provision of DSL Transport. However, Raw Bandwidth's complaint also raises issues that arise from its business relationship with Defendants, such as the CD ROM billing dispute.

The Commission has found that a business meets the definition of customer when it pursues issues relating to its status as a consumer of utility services, especially when it is advocating for changes to a tariff under which the business takes service. (*Rulemaking Re The Line Extension Rules of Electric and Gas Utilities*, D.00-04-026, 2000 Cal. PUC LEXIS 203 *18.) A business is not a customer when it is a competitor advocating for changes expanding its opportunities to compete. (*Id.*) Competitors that have a clear and substantial competitive interest in an issue should not receive ratepayer funding for advocating on that issue. (*Id.* at *19.) Raw Bandwidth raises both issues relating to its status as a customer, such as unreasonable delay when moving DSL service from one address to another, and competitive issues, such as portions of the issues relating to disconnection of DSL Transport service after the voice line has been disconnected.

Raw Bandwidth has shown that it is a participant representing consumers or customers, as set forth in § 1802(b). Although Raw Bandwidth raises issues that have personal and competitive impacts, most of the issues raised by Raw Bandwidth have broader applicability.

Nature and Extent of Planned Participation; Estimate of Compensation

Section 1804(a)(2)(A) provides that the NOI shall include both a statement of the nature and extent of a customer's planned participation and an itemized estimate of the compensation that the customer expects to request.

Planned Participation

The Commission has stated that the information provided on planned participation should provide the basis for a critical preliminary assessment of whether (1) an intervenor will represent customer interests that would otherwise be underrepresented, (2) the participation of third-party customers is nonduplicative, and (3) that participation is necessary for a fair determination of the proceeding. The Administrative Law Judge may issue a preliminary ruling on these issues, based on the information contained in the NOI and in the Assigned Commissioner's scoping memo. (D.98-04-059, *mimeo.*, at pp. 27-28, 31-33.)

Raw Bandwidth is the complainant in this proceeding and is participating on all issues raised in the Complaint. Raw Bandwidth and Defendants have settled many issues raised in the Complaint, two issues were formally withdrawn, three issues were set for formal proceedings in the scoping memo, and the parties have resolved two of those issues in settlement negotiations. Under Pub. Util. Code § 1803(b), a customer is eligible for an award of compensation if the customer's participation makes a substantial contribution to the adoption, in whole or in part, of the Commission's order or decision. Thus,

Raw Bandwidth only is eligible for compensation for issues resolved by order or decision.

Estimate of Compensation

Pub. Util. Code § 1804(a)(2)(A)(ii) requires that the NOI include an itemized estimate of compensation the intervenor expects to request. Raw Bandwidth must address the reasonableness of the requested rates in the context of the Commission's market rates in its ultimate Request for Compensation. This ruling does not ensure compensation.

Raw Bandwidth states it will request compensation for its attorney, Mr. Kashdan, at \$200 per hour and for Mr. Durkin, president of Raw Bandwidth but serving as an expert witness in this proceeding, at \$100 per hour. Raw Bandwidth estimates a total of \$700 for expenses and \$36,600 for fees for a total of \$37,300. Raw Bandwidth estimates 70% of the time will be spent on the telemarketer issue, 25% on the 611 issue, and 5% on the CD ROM billing issue.

Raw Bandwidth is cautioned that it should carefully document the number of hours and hourly fees for counsel and carefully allocate such expenses to specific issues pursued in this proceeding in order to avoid requests for compensation for issues that have personal or competitive impacts. Raw Bandwidth should also review Commission orders and, in preparing its compensation request, take into account the Commission's practices for reducing hourly rates and hours claimed, e.g., for travel time and time spent on the compensation request itself.

Significant Financial Hardship

Raw Bandwidth declines to make a showing of significant financial hardship at this time. Section 1802(g) defines "significant financial hardship" as:

"either that the customer cannot afford, without undue hardship, to pay the costs of effective participation, including

advocate's fees, expert witness fees, and other reasonable costs of participation, or that, in the case of a group or organization, the economic interest of the individual members of the group or organization is small in comparison to the costs of effective participation in the proceeding."

Under § 1804(a)(2)(B), this showing may be made in the NOI, or alternatively, deferred until the request for compensation is filed. Raw Bandwidth has elected to make the financial hardship showing in its request for compensation and cannot be found eligible for compensation prior to making that showing.

Raw Bandwidth must satisfy the "cannot afford, without undue hardship, to pay" standard. Because Raw Bandwidth estimates its total costs will be \$37,300 and only a portion of that time, approximately 25% or \$9,325, will be allocated to the issue to be resolved by order or decision of the Commission, Raw Bandwidth will have great difficulty establishing that it has a significant financial hardship. Although Raw Bandwidth is a small ISP, with approximately 700 customers, and has not provided financial information in this proceeding, Raw Bandwidth faces a significant hurdle in establishing that it cannot afford, without undue hardship, to pay the cost of participation in this proceeding.

IT IS RULED that:

1. Raw Bandwidth Communications, Inc. (Raw Bandwidth) is a customer as that term is defined in Pub. Util. Code § 1802(b).
2. Raw Bandwidth has fulfilled the requirements of § 1804(a)(2)(A) by providing a statement of the nature and extent of its planned participation and an itemized estimate of the compensation it expects to request.

3. Along with any request for an award of compensation, Raw Bandwidth must show a significant financial hardship by establishing that it cannot afford, without undue hardship, to pay the cost of effective participation.

Dated December 22, 2003, at San Francisco, California.

/s/ STEVEN KOTZ for
Janice Grau
Administrative Law Judge

CERTIFICATE OF SERVICE

I certify that I have by mail, and by electronic mail to the parties to which an electronic mail address has been provided, this day served a true copy of the original attached Administrative Law Judge's Ruling Regarding Notice of Intent to Seek Compensation on all parties of record in this proceeding or their attorneys of record.

Dated December 22, 2003, at San Francisco, California.

/s/ KE HUANG

Ke Huang

N O T I C E

Parties should notify the Process Office, Public Utilities Commission, 505 Van Ness Avenue, Room 2000, San Francisco, CA 94102, of any change of address to ensure that they continue to receive documents. You must indicate the proceeding number on the service list on which your name appears.